§523(A)(2)(A) : Actual fraud pre credit card revocation

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Waycross Division

In the matter of: ANTHONY FLOWERS (Chapter 7 Case 586-00029) Debtor THE CHASE MANHATTAN BANK (USA) N.A. Plaintiff v. ANTHONY FLOWERS Defendant	Adversary Proceeding Number 586-0007

FILED
at 11 O'clock & 10 min. A M
Date 6/9/88
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia POB

MEMORANDUM AND ORDER

On August 5, 1986, the Honorable Herman W. Coolidge presided over the trial at which the complaint filed by The Chase Manhattan Bank (USA) N.A., ("Chase Manhattan") was heard. On June 18, 1987, Judge Coolidge entered a default Judgment and granted Chase Manhattan a Judgment in the amount of $3,548.59 in principal, together with additional interest computed at a rate of 19.8% per annum from March 10, 1985, until paid. This amount represents the debt incurred after Chase

Manhattan notified the Debtor that his Visa card was canceled. Judge Coolidge denied the Plaintiff relief as to debt incurred before the credit card was canceled. On appeal, the District Court, Honorable B. Avant Edenfield, affirmed Judge Coolidge's Judgment as to post-cancellation debt, but remanded the case to allow Chase Manhattan an opportunity to present evidence on whether the pre-cancellation debt was incurred under circumstances which rose to the level of an 11 U.S.C. Section 523(a)(2)(A) exception to discharge. On February 16, 1988, a trial was held for these purposes. At the conclusion of the evidence, Chase Manhattan requested time to submit a brief for consideration. Chase Manhattan was given twenty (20) days to do so and the Debtor was given twenty (20) days to respond. On April 25, 1988, some sixty-seven (67) days after the trial on the merits had been conducted, Chase Manhattan requested an extension of time which request was denied.

Based on the evidence adduced at trial, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) On or about September 27, 1984, the Debtor

completed a "Chase Manhattan Visa Request Coupon" which indicated that Chase Manhattan was holding a Visa card for the Debtor with a credit line of $3,000.00. (Exhibit P-3). The only information requested from the Debtor was his employer's name and address, his position, mother's maiden name, home telephone number, signature and date. No income or expense information was requested or required. Chase Manhattan approved the request and issued a Visa card with a $3,000.00 line of credit.

The Debtor's first transaction was on October 27, 1984, and his last precancellation transaction was on January 13, 1985. The Debtor engaged in no charge activity between January 13, 1985, and the March 10, 1985, closing of his account by Chase Manhattan.[1] In effect, the Debtor actively used his visa for 11 weeks and 5 days or 82 days before he voluntarily suspended his card use. The Debtor's monthly statements reflect the following:

[1] The amount previously declared non-dischargeable represented only charges made after March 10, 1985.

STATEMENT CLOSING DATE	NO. OF CHARGES	AMT. OF CHARGES	CASH ADV.	PAYMENTS & CREDITS	MINIMUM PAYMENT DUE	PREVIOUS BALANCE	NEW BALANCE
11/10/84	6	$ 99.71 or $16.62 per charge	-0-	-0-	$30.00 due by 12/5/84	-0-	$ 99.71
12/10/84	32[2]	$ 837.69 or $26.17 per charge	$900.00[3]	-0-	$80.00 due by 1/4/85	$ 99.71	$1,858.42
1/10/85	41	$1,676.37 or $40.89 per charge	-0-	$100.00	$96.00 due by 2/4/85	$1,858.42	$3,478.28
2/10/85	12	$ 203.27 or $16.94 per charge	-0-	-0-	$199.00 due by 3/7/85	$3,478.28	$3,741.08
3/10/85	-0-	-0-	-0-	-0-	$303.00 due by 4/4/85	$3,741.08	$3,807.80

The Debtor made a $100.00 payment on December 19, 1984, which exceeded the $80.00 minimum payment required by the December 10, 1984, statement.

No payments were made in response to the January 10, 1985, or February 10, 1985, statements. It was not until

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[2] Exclusive of cash advances.

[3] It appears that Chase Manhattan sent two $300.00 cash advance vouchers with the Visa card. The Debtor's testimony, however, was unclear on this point.

the January 10, 1985 statement that Debtor exceeded his credit limit. Three days after the January 10, 1985 statement, Debtor made his last charge during the precancellation period.

Notwithstanding that Debtor exceeded his credit line as of the January 10, 1985, statement, Chase Manhattan did not notify the Debtor of pending cancellation until the March 10, 1985 statement.

The 91 pre-cancellation charges spread over the 82 days of active use break down as follows:

(1) Gas Stations: Includes Grady's Shell, Union Oil, Chevron, Exxon, and Mr. C's.

55 transactions totalling $905.29 or $16.46 per transaction every 1.5 days.

(2) Discount and Drug Stores: Includes Pic and Save, K-Mart, Wal-Mart and Eckerds.

17 transactions totalling $407.53 or $23.97 per transaction every 4.8 days.

(3) Hotels/Motels: Includes Bel Air Court, Holiday Inn of Jesup, and Ramada Inn in Atlanta.

9 transactions totalling $551.26 or $61.25 per transaction every 9.1 days. These figures are somewhat misleading if taken as a whole. Atlanta hotels are substantially more per night than those in Waycross or Jesup. Furthermore, although there were only 2 "transactions" for Atlanta, this actually represents 3

nights. Breaking the hotel/motel figures down more accurately, it follows that:

In Waycross and Jesup there were 7 transactions totalling $264.82 or $37.83 every 11.7 days; and

In Atlanta there were 3 transactions totalling $286.44 or $95.48 for each night, representing a trip to Atlanta every 41 days.

(4) Department/Clothing Stores: Includes J. C. Penney's and The Traffic Light.

7 transactions totalling $383.60 or $54.80 per transaction every 11.7 days.

(5) Western Auto:

2 transactions totalling $552.47. One in the amount of $510.88 and the other in the amount of $41.59. 1 transaction every 41 days.

(6) Visa Annual Fee:

1 transaction of $20.00.

2) The Debtor appeared pro se at trial. He testified that he had made four to five payments while he was working, notwithstanding that the monthly statements show only one payment. Debtor presented no evidence to support his allegation that he had made regular payments. The Debtor testified that it was always his intention to pay the charges incurred. On February 25, 1985, the Debtor lost his job and remained unemployed for some time thereafter.

3) In 1984 the Debtor earned $7,290.00 and received $4,200.00 in veterans benefits for a total annual income of $11,490.00. In 1985 the Debtor earned $5,666.00 and received $1,050.00 in veterans benefits and $1,054.00 in unemployment benefits for a total annual income of $7,770.00.

In effect, the Debtor earned approximately $957.50 per month in 1984. His monthly expenses for 1984 were as follows:

Rent	-	$210.00 to $250.00
Utilities	-	$100.00
Food	-	$160.00 to $200.00
Laundry	-	$ 5.00 to $ 10.00
Life Insurance	-	$ 42.00
Truck Payment	-	$350.00
Recreation	-	$ 00.00
Child Support	-	$200.00
Medical	-	$ 10.00
Truck Insurance	-	$400.00 per year
Gas	-	$ 30.00 per week

Total monthly expenses, therefore, ranged between $1,240.00 and $1,325.00 per month. None of these expenses are out of line with a reasonable budget.

4) The Debtor has a GED and one year of college.

5) Debtor and his ex-wife were divorced in

December of 1983. They both continued to live in Blackshear. The Debtor stayed in motels in Waycross and Jesup because of problems he was having with his ex-wife.

6) The Debtor put over 30,000 miles on his 4 X 4 truck in one year.

CONCLUSIONS OF LAW

The issue presented on remand is whether the Debtor's use of the Visa card issued by Chase Manhattan, from October, 1985 until the March 10, 1985 revocation constitutes actual fraud so as to demand that the $3,807.80 debt incurred during this period is non-dischargeable under 11 U.S.C. Section 523(a)(2)(A).

"Because of the very nature and philosophy of the bankruptcy law the exceptions to dischargeability are to be construed strictly, Gleason v. Thaw, 236 U.S. 558, 35 S.Ct. 287, 59 L.ed. 717 (1915), and the burden is on the creditor to prove the exception. Danns v. Household Finance Corp., 558 F.2d 114 (2nd Cir. 1977)." In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986). To prevail, creditors must establish the elements of actual fraud by clear and convincing evidence.

Matter of Carpenter, 53 B.R. 724 (Bankr.N.D.Ga. 1985).

The Eleventh Circuit in First National Bank of Mobile v. Roddenberry, 701 F.2d 927 (11th Cir. 1983), made it clear that "only after . . . clear revocation has been communicated to the cardholder will further use of the card result in liabilities obtained by 'false pretenses or false representations'." Id. at 932. In so holding, the Eleventh Circuit did not pr .lude a finding of non-dischargeability for pre-revocation charges if actual fraud is proven. Actual fraud sufficient to prevent a debt from being discharged pursuant to 11 U.S.C. Section 523(a)(2)(A) is shown by the use of a credit card with no intention to repay the debt. See Carpenter, supra at 727, In re Flowers, CV#587-036, at 7, (S.D.Ga. Jan. 11, 1988). The Debtor's ability to pay is relevant only to the extent that it combined with other factors establishes that the Debtor had no intention to repay the debt. See infra at 10.

"Fraud under Section 523(a)(2)(A) is interpreted as positive fraud, involving moral turpitude or intentional wrong, rather than fraud implied in law . . . Therefore, a mere breach of contract by the debtor or a mere failure to fulfill a promise to pay for goods is, without more, insufficient to establish non-dischargeability . . . By the same token, however, fraud can be established from circumstantial evidence."

Flowers, supra. at 9 (citations omitted). To prove actual fraud, a creditor must show:

(1) That the debtor made representations;

(2) That at the time he knew the representations were false;

(3) That he made them with an intention and purpose of deceiving the creditor;

(4) That the creditor reasonably relied on such representations;

(5) That the creditor sustained the alleged damages as a result of the misrepresentation.

Carpenter, supra at 729.

The first three elements of actual fraud are established if the "debtor misrepresented that he had the intent to pay for the charges incurred". Id. at 730. There are twelve factors which courts have used to determine whether a debtor had the intention to pay for the charges incurred. These include:

(1) The length of time between the charges made and the filing of bankruptcy;

(2) Whether or not an attorney had been consulted concerning the filing of bankruptcy before the charges were made;

(3) The number of charges made;

(4) The amount of charges;

(5) The financial condition of the debtor at the time the charges were made;

(6) Whether the charges were above the credit limit of the account;

(7) Whether the debtor made multiple charges on the same day;

(8) Whether or not the debtor was employed;

(9) The debtor's prospects for employment;

(10) Financial sophistication of the debtor;

(11) Whether there was a sudden change in the debtor's buying habits; and

(12) Whether the purchases were made for luxuries or necessities.

Id. at 730; also see: In re Blackburn, 68 B.R. 870, 880 (Bankr. N.D. Ind. 1987).

An application of these twelve factors to the case sub judicio shows the following:

1) Approximately one year one month and seven days elapsed between the Debtor's last pre-cancellation use of the card on January 13, 1985, and the filing of his Chapter 7 petition on February 21, 1986;

2) No evidence was introduced as to whether or not an attorney had been consulted concerning the

filing of bankruptcy before the charges were made. Presumably Debtor had not since the underlying Chapter 7 petition and the complaint adjudicated herein have been handled by the Debtor pro se;

3) The Debtor made some 91 charges, exclusive of cash advances, during the pre-cancellation period;

4) The Debtor made $2,817.04 in charges, exclusive of an additional $900.00 in cash advances, during the pre-cancellation period;

5) The Debtor was gainfully employed and was earning approximately $957.50 per month. The Debtor's expenses ranged between $1,240.00 and $1,325.00 per month;

6) Standing alone the charges incurred by the Debtor did not exceed his $3,000.00 credit limit. Taking into consideration the cash advances of $900.00, the Debtor's charges exceeded his credit line by $807.80. This figure includes $190.76 in finance charges and late fees. However, the Debtor made no additional charges beginning three days after the January 10, 1985, statement was issued which advised him that he had exceeded his credit limit.

7) The Debtor did make multiple charges on the same days;

8 and 9) At all times during the pre-cancellation period in which the Debtor actively used the Visa card he was gainfully employed with regular income. Moreover, after losing his job on February 25, 1985, the Debtor incurred no additional pre-cancellation charges;

10) The Debtor has a GED and one year of college; however, there was no evidence of unusual sophistication in the management of credit or financial planning;

11) No evidence was introduced to indicate a sudden change in the Debtor's buying habits; and

12) The purchases appear to have been for necessities, not luxuries. The vast majority of Debtor's purchases were for gasoline. No evidence was introduced as to what the $900.00 in cash advances was used for.

From the evidence introduced at trial, I cannot conclude that the Debtor misrepresented his intent to pay the charges he incurred. Although the Debtor was late in paying the minimum payment due under the November 10, 1984 statement, he did make a $100.00 payment on December 19, 1984 which brought him current. It was not until the minimum payment due of $96.00 under the January 10, 1985 statement became due and payable on February 4, 1985 that the Debtor became and subsequently remained delinquent. It is crucial to note that three days after the

January 10, 1985 statement was issued indicating that the Debtor had exceeded his credit line, the Debtor voluntarily suspended any further use of the credit card.

Finally, even though the Debtor had exceeded his credit line as of the January 10, 1985 statement the Bank did not act to revoke the Debtor's credit card until the March 10, 1985 statement. The Bank's failure to act more quickly supports the observation of Roddenberry that

> "banks have a definite interest in permitting charges beyond established credit limits because of the high finance charges typical in such transactions . . . banks are willing to risk non-payment of debts because that risk is factored into the finance charges. Because the risk is voluntary and calculated, Section 17a(2) should not be construed to afford additional protection for those who unwisely permit or encourage debtors to exceed their credit limits."

Id. at 932. (Emphasis added).

Although a bank's voluntary assumption of the risk of a borrower's nonpayment will not serve to overcome a clear and convincing showing that the Debtor misrepresented his intention to pay, there is no such proof in this case.

Since Chase Manhattan has failed to provide

clear and convincing evidence that the Debtor falsely represented that he had an intention to pay when he used the charge card, there is no need to inquire into the other elements which the Bank would otherwise have the burden of proving. Accordingly, I hold that Chase Manhattan has failed to prove that the Debtor committed actual fraud by the use of the charge card during the pre-cancellation period.

In the District Court's Order on remand, I was instructed to consider the applicability of F.R.C.P. 55 as it relates to Chase Manhattan's allegations of the non-dischargeability of the Debtor's pre-cancellation debt. At the February 16, 1988, trial on remand, the Debtor appeared pro se and stated that he had in fact been present at the original trial on August 5, 1986. Apparently because he was confused or intimidated by the proceeding, the Debtor failed to respond when the case was called. "Although the clear policy of the Rules is to encourage disposition of claims on their merits . . . ", I am vested with discretion whether or not to enter a default judgment. United States v. Moradi, 673 F.2d 725, 727 (4th Cir. 1982). The entry of a default judgment is a drastic remedy and is appropriate only where there is a clear record of delay or contumacious conduct. E.F. Hutton & Company v. Mottatt, 460 F.2d 284 (5th Cir. 1972). In this case, there is no clear record of delay or contumacious conduct by the Defendant/Debtor. On the

contrary, the Debtor's behavior was more docile, domitable and submissive to the point that he made no response at the original trial, than it was stubborn, rebellious, obstinate or disobedient. It is also noteworthy that Debtor was unrepresented by counsel throughout these proceedings. Accordingly, I decline to enter a default judgment on the pre-cancellation debt.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the debt in the amount of $3,807.80 owed by Defendant, Anthony Flowers, to Plaintiff, Chase Manhattan Bank (U.S.A.) N.A., is discharged.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 8th day of June, 1988.